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IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 75-6297

RAMON MARTIN FIALLO, *etc., et al.*,

Appellants,

v.

EDWARD H. LEVI, individually and as Attorney General of the United States, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE APPELLANTS

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REPLY BRIEF FOR THE APPELLANTS

SUPPLEMENTAL STATUTORY SCHEME

Since the filing of the appellants' main brief in this case in August, 1976, a new federal law has been enacted amending the Immigration and Nationality Act in certain respects relevant to this case. Immigration and Nationality Act of October 20, 1976, Pub. L. 94-571. The recent amendments make the Eastern

Hemisphere preference system, and, accordingly, the exemption from labor certification based on certain preference classifications, applicable to the Western Hemisphere. Immigration and Nationality Act of October 20, 1976, Pub. L. 94-571, Sec. 2(1) amending INA §201(a) (8 U.S.C. §1151(a)); Sec. 4 amending INA §203 (8 U.S.C. §1153); Sec. 5 amending INA §212(a)(14) (8 U.S.C. §1182(a)(14)). Since there is not a preference classification for the parent of a minor United States citizen or legal permanent resident, the Western Hemisphere parent is no longer exempted from the labor certification requirement under the new law.[1] Thus this recent amendment has a significant effect on the posture and scope of this case. Appellants' claims which challenge the denial of labor certification exemption to the father of an illegitimate citizen or legal permanent resident child no longer present a viable issue prospectively beyond January 1, 1977, the effective date of the new law.[2] The amendment leaves

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[1] Prior to the recent amendments, quota numers were distributed to Eastern Hemisphere natives according to a preference system, but to Western Hemisphere natives on a first come, first serve basis. Immigration and Nationality Act of October 3, 1965, Pub. L. 89-236, Sec. 3 79 Stat. 912-915; Sec. 21(e) 79 Stat. 921. Eastern Hemisphere natives who were in certain preference categories were exempted from the labor certification requirement. As there was no preference system covering Western Hemisphere natives, the statute specified that certain relatives of United States citizens and legal permanent residents, including their parents, were exempt from a labor certification requirement. Immigration and Nationality Act of October 3, 1965, Pub. L. 89-236, Sec. 10 79 Stat. 917-918.

[2] Although these issues are no longer of the same consequence as formerly, the claims of appellants Fiallo and Wilson are nonetheless not moot. The new law contains a savings clause,

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remaining as the central issue in this case the question of the constitutionality of the statutory provision which discriminatorily denies a United States citizen unwed father the entry into the United States of his illegitimate child without regard to the numerical quota or labor certification requirements, by excluding them

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which provides that a person is entitled to receive the status for which he was eligible under the old law if an application for such status was made prior to January 1, 1977. Immigration and Nationality Act of October 20, 1976, Pub. L. 94-571, Sec. 9. The Fiallo and Wilson children have filed the appropriate forms to gain labor certification exemptions for their fathers, and thus they would be entitled, in the event that this Court found the prior law to have been unconstitutionally applied to them, to whatever immigration status they would have had but for the unconstitutional application of that law. *Stanton v. Stanton*, 421 U.S. 7, 11 (1975).

The so-called doctrine of consular non-reviewability, invoked by the Government (Appellees' brief, p. 11 n.12), does not constitute a bar to review of the constitutional claims of appellant Fiallo in this Court. That doctrine is said to bar administrative or judicial review of the decision of a United States consul abroad concerning the issuance or denial of a visa. The doctrine, even if viable, has no application here since, as found by the Court below (A- 54-55), appellant Fiallo is immediately concerned about the preliminary declaration of his immigrant status, not with his visa application. In any event, he does not seek judicial review of the ultimate outcome of the Consul's discretionary determination on his visa application, but rather only of the purely legal question of the constitutionality of a statute which bars the consul from even exercising his discretion in passing on the visa application. The distinction between the propriety of judicial correction of an immigration official's threshold error of law and the impropriety of judicial control over the ultimate discretionary decision iteself is well-settled. *Perkins v. Elg*, 307 U.S. 325, 349-350 (1939); *McGrath v. Kristensen*, 340 U.S. 162, 165, 168, 171 (1950); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954); *Jay v.*

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from the definition of "parent" and "child."[3] This is the issue presented by the appellant Warner.

Under both the prior and the new immigration law, a United States citizen "parent" is given statutory entitlement to the entry of his "child" as an "immediate relative" into the United States without regard to either a numerical quota or a labor certification if the citizen "parent" exercises his perogative to petition for such classification of his "child." INA §201(b) (8 U.S.C. §1151(b)); Immigration and Nationality Act of October 20, 1976, Pub. L. 94-571, Sec. 5 amending INA §212(a)(14) (8 U.S.C. §1182(a)(14)); INA §204(a) (8 U.S.C. §1154(a)). Under the new law, a Western Hemisphere as well as an Eastern Hemisphere child of a United States citizen, if without immediate relative status, is considered a

(footnote continued from preceding page)
Boyd, 351 U.S. 345, 354 (1956); *Sovich v. Esperdy*, 319 F. 2d 21 (2 Cir. 1963). *Also Wong Hing Hang v. I.N.S.*, 360 F. 2d 715, 717 (2 Cir. 1966); *Kovac v. I.N.S.*, 407 F. 2d 102, 104 (9 Cir. 1969); *Application of Maringolo*, 303 F. Supp. 1389, 1392, 1394 (S.D.N.Y. 1969); *United States v. Esperdy*, 188 F. Supp. 491, 499-500 (S.D.N.Y. 1960). The Government has plainly not sustained its heavy burden of overcoming by clear and convincing evidence the strong presumption that Congress did not mean to prohibit all judicial review, under the Administrative Procedure Act and the Declaratory Judgment Act, of errors of law made by consular officials. *Dunlop v. Bachowski*, 421 U.S. 560 (1975). *Cf. Wong Wing Hang v. I.N.S.*, 360 F.2d 715 (2 Cir. 1966). Any suggestion that the ultimate legal issue of the constitutionality of a federal statute is wholly immune from judicial review would itself raise serious constitutional questions. *Johnson v. Robison*, 415 U.S. 361, 366-67 (1974); *Weinberger v. Salfi*, 422 U.S. 749, 762 (1975).

[3] See Appellants' main brief at page 6.

non-preference immigrant.[4] It is extremely unlikely that a non-preference immigrant will be able to enter this country. The separate annual numerical quota for each country is fully allocated by statute among seven preference categories. A non-preference immigrant is eligible for an immigrant visa only when by chance a quota number is not used within any of the seven preference categories. INA §203 (8 U.S.C. §1153), as amended by Immigration and Nationality Act of October 20, 1976, Pub. L. Sec. 4. Further, a non-preference immigrant must also satisfy the difficult labor certification requirement.[5] INA §203(a)(8) (8 U.S.C. §1153(a)(8)).

ARGUMENT

POINT I

CONTRARY TO THE GOVERNMENT'S CONTENTIONS, THE CONSTITUTIONAL ARGUMENTS OF THE APPELLANT UNITED STATES CITIZENS ARE NARROWLY DRAWN, AND THIS CASE IS UNIQUE AMONG CASES INVOLVING IMMIGRATION LAW WHICH HAVE COME BEFORE THIS COURT.

[4] Prior to the recent amendments to the immigration act, the Western Hemisphere child without immediate relative status would be subject to the general Western Hemisphere quota and a labor certification requirement. Because the amendment extended the Eastern Hemisphere preference system to the Western Hemisphere, now both the Western and the Eastern Hemisphere citizen's child without immediate relative status is considered a non-preference immigrant.

[5] The difficulty of satisfying the labor certification requirement is explained in appellants' main brief at page 5.

The Government distorts the nature and implications of this case. Its position is fundamentally premised on the proposition that all cases involving provisions of the immigration law are essentially interchangeable and indistinguishable. The Government thus urges this Court to view this case as merely one which concerns exclusively the interests of aliens seeking to immigrate into this country, which makes little more than a mere "hardship" plea, and which attempts to "eliminate" Congress' power to ever determine which aliens may be excluded from this country. (Appellees' brief, p. 15.) Appellants, on the other hand, urge this Court to reject the Government's "all-or-nothing" argument as unworthy of a principled approach to constitutional adjudication, and rather to apply a discerning and discriminating analysis to this case. So viewed, this case is not merely another in a long line of unsuccessful and indistinguishable immigration challenges, but rather is unique. It thus becomes clear that this Court's invalidation of the extreme form of discrimination against citizens worked by these statutory provisions will not undermine or disturb the results in any of this Court's prior immigration decisions, nor will it have any of the dire consequences predicted by the Government here.

It is important to emphasize again precisely what this case does and does not involve. This case concerns the constitutionality of a statute whose exclusive Congressional purpose is to afford rights, not to aliens, but to United States citizens. The statute in question was indisputably passed to achieve the benevolent result of allowing United States citizen parents to choose to be reunited in the United States with their alien children. The legislative history discloses the total absence of any foreign policy concerns or a Congressional choice to exclude or expel aliens who posed a

threat to the national security or general welfare of this country. Rather, the gender of the citizen parent and the illegitimacy status of the alien child are the sole bases for the statute's denial to the United States citizen unwed father of any opportunity to establish his family relationship with his alien illegitimate child and to secure their reunification in this country. The interest of the United States citizen father which is thereby inevitably infringed is his fundamental constitutional interest in the companionship, care, custody and management of his child, and as a possible consequence, the incidents of his citizenship.[6] These features of the instant case fundamentally distinguish it from each and every one of the prior immigration cases which are relied upon by the Government.

It cannot be overemphasized that the statutory rights involved, and the constitutional rights asserted, in this case are those of United States citizens, not aliens.[7] While the alien child may in fact benefit, the

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[6] The Government attempts to casually dismiss the serious infringement worked by the statute on the fundamental constitutional interests of a United States citizen in a parent-child relationship and the incidents of citizenship by observing that at some time appellant parents and children were physically separated. (Appellee's brief, p. 31 n. 23). Such separation from their children, however, is equally inevitable for those parents who receive the benefit of the statutory entitlement in issue here. The citizen parent seeking the statute's benefit often will be a naturalized citizen. To become a naturalized citizen and thus to be eligible for the statute's benefit, a person must first spend five years in the United States as a legal permanent resident. INA §316(a) (8 U.S.C. §1427(a)). Those persons thus will also be separated from their children whom they seek to bring into this country under the statute without regard to numerical quota or labor certification requirements.

[7] This Court has held that provisions of the Immigration and Nationality Act cannot infringe the constitutional rights of

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statutory entitlement at issue here is clearly for the exclusive benefit of the United States citizen. Thus, the alien child cannot be classified as an "immediate relative" unless the United States citizen exercises his/her prerogative to petition for that classification. INA §204(a), (8 U.S.C. §1154(a)). Contrary to the Government's contention, appellants do *not* maintain that any citizen and alien relative who claim hardship or an interest in family unity must automatically be united in this country. Rather, appellants contend that the Constitution forbids Congress, when it is concerned only with maintaining or reuniting family units, from discriminatorily giving only some but not other United States citizens, solely on the bases of gender and legitimacy, the opportunity to establish their right to a statutory entitlement. That statutory discrimination is made even more egregious by the inescapable fact that the statutory discrimination inevitably infringes a United States citizen's constitutionally fundamental interest in his association with his child.[8]

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United States citizens. *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973); *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975). *Cf. Afroyim v. Rusk*, 387 U.S. 253 (1967); *Schneider v. Rusk*, 377 U.S. 163 (1964).

[8] The cases cited by the Government are inapposite. For example, in *United States ex rel Knauff v. Shaughnessy*, 338 U.S. 537 (1950), the Court held that the German wife of a United States citizen who sought to enter the United States in 1948 could be found excludable for a national security reason without a hearing upon the Attorney General's determination that the information involved was of a confidential nature, the disclosure of which would be prejudicial to the public interest. This action was pursuant to a law which sanctioned this procedure when the United States was at war or during a national emergency proclaimed by the President. The Court found the law and the

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The case relied upon by the Government to support its argument that this Court should automatically and without analysis affirm the legislative discrimination involved here bear strikingly little resemblance to this unique case. Each of those cases diverges fundamentally from this case in one or more of several crucial respects. None of these prior cases involved the constitutionality of a statute whose exclusive Congressional purpose was solely to afford rights not to aliens but to United States citizens, and to secure the fundamental constitutional interests of citizen parents in a familial relationship and association in this country with their children. In none of the immigration cases relied on by the Government were essentially procedural due process rights of citizens at stake, nor were there presented for review in those cases statutory provisions which discriminate on the dual bases of sex and illegitimacy founded on archaic and overbroad stereotypes. Finally, these prior immigration cases uniformly involved foreign policy concerns[9] or a clearly expressed Congressional choice to exclude or expel a certain group of aliens who were specifically and clearly perceived to pose a grave threat to the national

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procedure "reasonable in the circumstances of the period for which they were authorized, namely, the national emergency of World War II." *United States ex rel Knauff v. Shaughnessey, supra*, at 544. The alien in that case did not claim that the mere fact that she was related to a United States citizen saved her from deportation or exclusion. No claim was or could have been made that a citizen was being subjected to discrimination.

[9] *See, for example, Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

security[10] or to the general welfare[11] of this country. See Appellants' main brief, pp. 52-55.

The Government's heavy reliance upon *Kleindienst v. Mandel*, 408 U.S. 753 (1972), is clearly misplaced. In that case, this Court rejected the claim of certain United States citizens that their First Amendment rights were unconstitutionally violated when the Attorney General refused entry into the United States to Mr. Mandel, who was to make a speech to them. Mr. Mandel, however, was concededly excludable as an alien who advocated the doctrines of world communism and was not eligible for a discretionary waiver because he had flagrantly abused the terms of his entry on a prior trip to this country. As this Court observed, the appellees' argument in *Kleindienst* would have "prove[d] too much," since it would have required that every alien, whether or not excludable from the United States, would have to be granted entry into the United States, whenever a United States citizen wanted to meet and talk with him. 408 U.S. at 768-69. The instant case is not comparable. The invalidation of the statutory provisions challenged here would *not* as insisted by the Government, enable any citizen to successfully demand the entry into the United States, under any circumstances, of any alien relative with whom he/she could claim a family tie. (Appellees' brief, pp. 30-32.) The result of the statute's invalidation would only prohibit this extreme form of Congressional discrimination, whereby *all* United States citizen fathers of illegitimate children are flatly denied *any* opportunity to qualify for a statutory entitlement which is automatically

[10] *See, for example, Harisiades v. Shaughnessy*, 342 U.S. 580, 590 (1951); *Galvan v. Press*, 347 U.S. 522, 529 (1954).

[11] *See, for example, Boutilier v. Immigration and Naturalization Service*, 387 U.S. 118 (1967).

afforded to other similarly situated citizen parents. It would have the effect only of placing similarly situated United States citizens on equal footing in terms of their opportunity to qualify their alien children for entry into the United States without regard to numerical quota or labor certification requirements, and those children would, in any event, have to satisfy all other legal requirements for admission.

Finally, even those cases which speak in the broadest terms about Congressional power when only the rights of aliens are involved confirm the reviewability of the constitutionality of any Congressional act.

> The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is *required by the paramount law of the Constitution*, to intervene. (emphasis added)
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> *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893).

Hampton v. Mow Sun Wong, ___U.S.___, 48 L.Ed. 2d 495, 508 n. 21 (1976). *See also Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889); *Mathews v. Diaz*, ___U.S.___, 48 L.Ed.2d 478, 491 (1976). *Cf. Wong Yang Sung v. McGrath*, 339 U.S. 33, 49 (1950). Congress itself agrees. House Report 1365, 82nd Cong., 2d Sess., p. 6 (1952). Indeed, the proposition that the Government sets forth, that a whole area of law is totally immune from constitutional inquiry, is completely repugnant "to the basic concept of separation of powers and the checks and balances that flow from the scheme of tripartite government," of which the

judiciary is a co-equal branch. *United States v. Nixon*, 418 U.S. 683, 704 (1974). Since the creation of our government, it has been a cardinal principle that the Supreme Court is to be the ultimate interpreter and guardian of the Constitution.[12]

> Many decisions of this Court . . . have unequivocally reaffirmed the holding of *Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60 (1803), that "[i]t is emphatically the province and duty of the judicial department to say what the law is." Id., at 177, 2 L.Ed. 60.
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> *United States v. Nixon*, 418 U.S. 684, 703 (1974)[13]

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[12] *See* The Federalist Papers, No. 78.

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority. . . Limitations of this kind can be preserved in practice in no other way than through the medium of the courts of justice whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.
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> Hamilton, Alexander, The Federalist No. 78 in *The Federalist* (H. Lodge, ed., G.P. Putnam's Sons, 1888) p. 484-485.

[13] Should this Court conclude that the cases relied upon by the Government do stand for the proposition that Congress unvaryingly has absolute power to enact unconstitutional statutes which are not subject to judicial review, then appellants respectfully request that this Court re-examine and overrule those cases insofar as they might immunize this statute from constitutional invalidation. The rationale which the Government advances to support its argument of judicial non-reviewability is, upon analysis, without validity.

The Government's position relies on four erroneous premises. First, the Government contends that no provision of immigration law is subject to constitutional scrutiny because Congress' absolute power is based on a "principle of international law that a

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POINT II

CONTRARY TO THE GOVERNMENT'S CONTENTIONS, THE CHALLENGED STATUTORY CLASSIFICATIONS ARE UTTERLY IRRATIONAL IN LIGHT OF THE ACTUAL LEGISLATIVE PURPOSE AND IN VIEW OF THE ARCHAIC AND OVERBROAD STEREOTYPE UPON WHICH THEY REST, AND ACCORDINGLY ARE UNCONSTITUTIONAL.

Without the citation of any legislative history to support its position, the Government asserts that the

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sovereign nation has the inherent power to exclude or admit foreigners." Appellees' brief, p. 19. But under our form of government the sovereign is limited by the Constitution; there can be no extra-constitutional Congressional power.

> This power cannot. . .be sustained as an implied attribute of sovereignty possessed by all nations. Other nations are governed by their own constitutions, if any, and we can draw no support from theirs. In our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship. Our Constitutions governs us and we must never forget that our Constitution limits the Government to those powers specifically granted or those that are necessary and proper to carry out the specifically granted ones.
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> *Afroyim v. Rusk*, 387 U.S. 253, 257 (1967).

See also Appellants' reply brief, *supra*. Second, the Government argues that absolute deference of the judiciary to Congressional power is required because of the inevitable interrelationship between immigration policy and foreign relations and national security policy. Appellees' brief, p. 33. But the Congressional exercise of both the foreign affairs and war power are, upon analysis and in appropriate cases, subject to constitutional scrutiny by the judiciary.

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blanket statutory discrimination against United States citizen unwed fathers of alien illegitimate children is supportable because it allegedly represents a considered and deliberate Congressional policy choice, based on the Congress' "common experience" that fathers of illegitimate children do not have close family ties with their illegitimate children. Thus, the Government essentially

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> There are sweeping statements to the effect that all questions touching foreign relations are political questions... Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.
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> *Baker v. Carr*, 369 U.S. 186, 211 (1962). [T]he phrase "war power" cannot be invoked as a talismanic incantation to support any exercise of Congressional power which can be brought within its ambit...[E]ven the war power does not remove constitutional limitations.
>
> *United States v. Robel*, 389 U.S. 258, 263-264 (1967).

The Congressional exercise of power over immigration, if derived from the foreign affairs and war power, should be no less judicially reviewable than are other Congressional enactments resting on war and foreign policy powers. Third, the Government, in contending that no immigration statute is reviewable, asserts that this Court has upheld discrimination on the basis of race contained in an immigration law, citing *Chae Chan Ping v. United States,* 130 U.S. 581 (1889). That case involved a statute which excluded only Chinese laborers from among nationals of China. But even if that case did uphold racial discrimination, it was decided at a time when racial discrimination was considered constitutional, *Plessy v. Ferguson*, 163 U.S. 537 (1896), a premise which has since been clearly repudiated. *Brown v. Board of Education*, 347 U.S. 483 (1954). Finally, this Court has in recent years rejected the distinction between "rights" and "privileges" as a basis for immunizing whole areas of the law from judicial scrutiny. *Graham v. Richardson*, 403 U.S. 365, 374 (1971); *Bell v. Burson*, 402 U.S. 535 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970). *Contrast Barsky v. Board of Regents*, 347 U.S. 442, 451 (1954).

attempts to engraft onto Congressional intent a purportedly conscious, willful, and calculated judgment on the part of Congress of the lack of family ties between unwed fathers and their illegitimate children. The Government hypothesizes that this judgment in turn led Congress to make the alleged "reasonable empirical judgment" that case-by-case adjudications of the family relationships of unwed fathers and their children simply were not worth making. As this Court has repeatedly emphasized, however, the legitimate legislative purpose in light of which the rationality of federal statutory classifications can be measured must rest upon a surer footing than the mere unsubstantiated speculation of the parties bereft of any supportive legislative history.

As Appellants have demonstrated (see Appellants' main brief, pp. 31- 36), the exclusive purpose of Congress in enacting the challenged statutes was the benevolent one of enabling United States citizen parents to be reunited in this country with their alien children, whether the family relationship be legitimate or illegitimate.[14] Upon a more careful analysis than the

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[14] The Government nonetheless advances other interests as justification for the statutory classifications. But the conspicuous failure to summon any legislative history to support its position confirms, as appellants demonstrated in their main brief, that the interest asserted by the Government in facilitating administrative convenience by reducing the potential for spurious claims (see appellee's brief, at pp. 44-6) is a manufactured and wholly hypothetical objective with which Congress had no concern in enacting the challenged provisions. Thus the rationale of preventing fraudulent claims and furthering administrative convenience is unavailable as a justification for the discrimination worked by the statutory classifications. *Mathews v. Lucas,* __U.S.____, 49 L. Ed. 2d 651, 662 n. 14 (1976); *Weinberger v. Wiesenfeld,* 420

(continued)

Government undertakes, it is manifest that the exclusive basis and underpinning for the challenged classifications was a bare, unarticulated, and unconscious stereotype that unwed fathers of illegitimate children do not, while other parents do, have family ties with their children. As appellants have demonstrated in their main brief, pp. 25-29, that stereotype does not accord with reality and is grossly overbroad. Thus, simply stated, the question becomes whether the Congress can, consistent with the Fifth Amendment to the United States Constitution, make gross distinctions among United States citizens on the basis of sex and illegitimacy—distinctions which inevitably infringe the constitutionality fundamental associational rights of citizens—solely and exclusively on the basis of a bare, unconscious stereotype which involves archaic and outmoded generalizations concerning the relationship between unwed fathers and their illegitimate children.

The statistics and sociological data cited by the appellants and unrebutted by the Government, and the factual circumstances of the appellants' cases, certainly put to rest the suggestion that citizen unwed fathers should be absolutely denied any opportunity to establish their family relationships with their illegitimate children, while other parents are conclusively presumed to have relationships with their children. Yet that is precisely the proposition that is embodied in the challenged statutory provisions. It is wholly irrational and impermissible for Congress, based exclusively on an

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(footnote continued from preceding page)
U.S. 636 (1975); *Jimenez v. Weinberger*, 417 U.S. 628 (1974). Moreover, as appellants have demonstrated in their main brief, pp. 40-51, the purported interest in administrative convenience is, in any event, not advanced in a rational manner by the challenged classifications.

archaic and overbroad stereotype, to legislate the array of conclusive presumptions challenged here: (1) that all United States citizen wives of the fathers of illegitimate children have close ties with their husbands' illegitimate children, yet that none of the fathers of those same children ever have close ties with their own children; (2) that all fathers of out-of-wedlock children who happen to live in places where all children are considered legitimate[15] always have close ties with their children, yet that none of the fathers of out-of-wedlock children who happen to live elsewhere ever have close ties with their children; (3) that all fathers of illegitimate children who live in places where a simple action such as the written acknowledgement of paternity legitimates their children always have close ties with their children, yet that none of the fathers of illegitimate children who have also acknowledged their children in writing but who do not live in places which recognize such actions as legitimation ever have close ties with their children; (4) that all divorced or separated fathers always have close ties with their children, yet that none of the fathers of illegitimate children ever have close ties with their children[16]; (5)

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[15] See Appellants' brief, p. 46 n. 50; Appellees' brief. p. .

[16] As demonstrated by the figures from the most recent census, presented by appellants in their post-argument memorandum to the three-judge court below, this presumption is not factually valid. The 1970 census showed that 14.3% of the "single parent" (never married, not divorced, widowed or separated) families with "own children," as compared to 10% of the divorced families with "own children" and 7.4% of the separated families with "own children," were headed by fathers. Correspondingly, 13.9% of the children in "single parent" families, as compared to only 8.8% of the children in divorced families and only 5.9% of the children in separated families, lived with their fathers. United States Bureau of the Census, 1 U.S. Census of the

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that all mothers of illegitimate children always have close ties with their children, yet that none of the fathers of illegitimate children ever have close ties with their children; (6) that all men who are prospective adoptive parents of orphaned children always have close ties with those children, yet that none of the fathers of illegitimate children ever have close ties with their children.[17]

(footnote continued from preceding page)
Population 1970, Characteristics of the Population, Pt. 1, U.S. Summary-Sec. 2 Table 206 (1973). See appellants' main brief p. 27-28, n. 21 for citation to and full explanation of the definition of "single parent" and "own children."

[17]The 1970 census figures demonstrate that 14.3% of families headed by a "single parent" with "own children" under 18 were headed by fathers and correspondingly that 13.9% of children under eighteen living with "single parent" lived with their single fathers. U.S. Bureau of the Census, 1 U.S. Census of the Population 1970, Characteristics of the Population, Pt. 1, U.S. Summary-Sec. 2, Table 206 (1973). These figures would undoubtedly be even higher were it not for laws such as the one challenged in this case which have effectively prevented fathers and their illegitimate children from living together. Thus until 1972, when *Stanley v. Illinois*, 405 U.S. 645, was decided, states were allowed to deprive an unwed father of the custody of his illegitimate child even if he were not proven to be an unfit parent. Moreover, the figure does not fully reflect all those fathers who live with their illegitimate children. For example, the census category upon which the figure is based would not include those fathers who lived with the mothers of their children as well as with their children, and those fathers who lived with their parents as well as with their children. See, for example, a study which reported that 33% of illegitimate fathers lived with the child and mother sometime after the child's birth. Sauber, "The Role of the Unmarried Father", 4 *Welfare in Review* 15, 16 (Nov. 1966). Further, as other studies have shown, even fathers not living with their illegitimate children demonstrate genuine interest in and concern for them and assume the sociological functions of fatherhood, including the provision of financial and emotional support. See Appellants' main brief, pp. 27-28.

In its brief, the Government effectively concedes the utter irrationality of the stepparent provision (INA §101(b)(1)(B) and (2) (8 U.S.C. §1101(b)(1)(B) and (2)). See Appellees' brief, p. 38 n. 28. Under this provision, if the unwed father of an illegitimate child marries someone other than the mother, his wife is his illegitimate child's "parent," and if his wife has an illegitimate child by some other man, her husband is her child's "parent." Yet the unwed natural father is totally precluded by operation of the statute from qualifying as the "parent" of his own child. The Government essentially contends that the irrationality is cured by a narrowing construction adopted by the defendants which requires proof in the stepparent case of the existence of actual family unity. It is simply and patently not a sufficient answer to the irrationality of the statutory classification that the administrative agency, in implementing the statute, has interpreted a provision of it so as to dilute its facial irrationality. Moreover, if the overbreadth of the stepparent category can be so readily and conveniently cured by the flexibility of administrative rules and procedure, any similar overbreadth that might exist in allowing United States citizen unwed fathers to qualify their alien illegitimate children for the statutory right in question can be dealt with in identical fashion by the administrative agency. See Appellant's main brief, pp. 42-48.

Even if there were some empirical support, which the Government has not mustered, for the gender and legitimacy based generalizations concerning the family relationship between unwed fathers and their illegitimate children, there could still be no constitutional justification for these extreme statutory classifications, since they deny citizen unwed fathers and their alien illegitimate children even an opportunity to establish an

eligibility for a statutory right which is merely presumed for other parents and children.[18] Thus, in *Frontiero v. Richardson* 411 U.S. 677 (1973), this Court held unconstitutional the statutory discrimination against a married woman who was seeking additional salary and fringe benefits that would have automatically gone to a married man, despite the observation that husbands in our society are generally "bread winners" and wives are "dependents," and despite the fact that under the statute the woman afforded the procedural opportunity to prove her husband's dependence on her. In *Weinberger v. Wiesenfeld*, 402 U.S. 636 (1975), this Court, while observing that "the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support," held that it was nonetheless unconstitutional to provide Social Security benefits to widows but not widowers with children in their care. In *Stanley v. Illinois*, 405 U.S. 645 (1972), this Court held that even if it could be assumed that most unmarried fathers are unsuitable and neglectful parents, this would nonetheless not justify the presumption that fathers but not mothers of illegitimate children are always unfit parents.

Plainly inapposite here are *Weinberger v. Salfi*, 422 U.S. 749 (1975), and *Mathews v. Lucas*, ___U.S.___, 49 L.Ed.2d 651 (1976). The Government cannot succeed in its efforts to equate the gross unconscious stereotype

[18] Further, any such empirical support for the contention that the parents covered by the statute are more likely than unwed fathers to have close ties to their children would not sustain the validity of this statutory classification, because under the statute eligibility for the statutory right is not necessarily conditioned upon establishment of close family ties in every case. *Cf. Weinberger v. Wiesenfeld*, 420 U.S. 636, 654 fn. (concurring opinion).

which underlies the classifications challenged here with the clearly articulated substantive policy determination which provided the foundation for the statute upheld in *Salfi*. In *Salfi*, the majority emphatically stressed the importance to the result in that case of the actually expressed and strongly held Congressional purpose to avoid the recognized abuse of sham marriages by enacting the nine-month-duration-of-relationship requirement of the Social Security Act which was found to be rational.[19] Further, in enacting the statute sustained in *Salfi*, Congress legislated by means of a broad prophylactic rule which was applied evenhandedly to all categories of claimants, without picking and choosing among affected persons according to their sex or illegitimacy. It is this invidious element of dual sex and illegitimacy discrimination which additionally distinguishes this case from *Salfi*. Indeed, had *Salfi* involved the imposition by Congress of the nine-month-duration-of-relationship requirement on surviving spouses of one sex and not the other, on the basis of sexual stereotyping, the result would surely have been different. *Contrast Weinberger v. Wiesenfeld, supra.*

Mathews v. Lucas, ___U.S.___, 49 L.Ed. 2d 651 (1976), differs fundamentally from this case. There, the

[19] As appellants have shown, Congress indicated no concern with spurious claims or administrative convenience in enacting the challenged provisions. Appellants' main brief, p. 40. It is noteworthy that at Congressional hearings recently held to consider a bill that would have equalized the situations of citizen unwed fathers and other citizen parents (see appellees' brief, p. 46 n. 34), the members of the subcommittee clearly expressed their view that the potential for fraudulent claims is not a concern of Congress and should be addressed by the agencies and personnel who administer the statute. Hearings on H.R. 10993 before the Subcommittee on Immigration, Citizenship and International Law of the House Committee on the Judiciary, 94th Cong., 2nd Sess. (July 28, 1976).

majority emphasized that the challenged statute discriminated against a certain group of illegitimate children only to the extent of imposing on them a burden of proof of which others were relieved. This Court made it clear that this factor crucially distinguished the *Lucas* statue from that which was invalidated in *Jimenez v. Weinberger*, 417 U.S. 628 (1974), which flatly and conclusively denied to a sub-class of illegitimate children *any* opportunity to establish eligibility for federal benefits. The provisions challenged in this case, unlike the ones sustained in *Lucas* and like the ones invalidated in *Jimenez* and *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), absolutely forclose United States citizen unwed fathers from *any* opportunity to establish their family relationship with their alien illegitimate children, while automatically presuming the existence of the family relationship between other parents and children. Additionally, this Court in *Lucas* distinguished *Frontiero v. Richardson*, 411 U.S. 677 (1973), a case also involving a statute which merely imposed a heavier burden of proof on the affected class, by observing that the discrimination in *Frontiero*, like that at issue here, was "gender based" and rested upon an "overbroad assumption."

Finally, the Government argues that this Court should not invalidate the challenged statutory classifications because of the allegedly disruptive administrative implications of such a result. Appellee's brief, p. 45. However, as appellants showed in their main brief, pp. 40-48, any administrative inconvenience attendant upon the claims made by citizen fathers of alien illegitimate children is no different from that involved in the determination of the claims of parents who come within the statutory definition. The determination of paternity would be exactly the same for the father of

an illegitimate child as for the unwed father of a child who happens to be legitimate because she/he was born in a place where all children are legitimate, or for the father of an illegitimate child whose wife is considered his child's parent. In a letter submitted to a Congressional subcommittee and lodged by the Government with the Clerk of this Court (see Appellees' brief, p. 40 n. 29), the defendant Administrator of the Bureau of Security and Consular Affairs, testifying on behalf of the Department of State, concedes that consuls have already developed and routinely apply standard methods for the determination of paternity of an illegitimate child. More fundamentally, in every case of a claimed parent-child relationship, the burden rests on the claimed citizen parent to establish to the satisfaction of consular and immigration officers, by whatever evidence they require, that in fact she or he is the parent of the child. See Appellants' main brief pp. 42-44.

It is difficult to comprehend what would motivate a United States citizen to fraudulently claim the fatherhood of an illegitimate child who was not in fact his own. In order to sustain his claim of parenthood, the United States citizen must gather evidence and subject himself to the scrutiny of immigration officials on two separate occasions. He must make a trip to another country and subject himself to the scrutiny of a United States consul. If he perpetrates any fraud he is subject to serious criminal penalties. He must reveal his assets and agree to be financially responsible for a child. See Appellants' main brief pp. 42-44. And his only reward is the companionship of and responsibility for a child,

which, if not his own, he would be presumptively have no interest in.[20]

In summary, appellants contend that this Court can not and should not constitutionally tolerate such extreme discrimination against United States citizens as is embodied in the challenged statutory provisions, discrimination which bears no rational relationship to the actual Congressional purpose, discrimination on the bases of gender and illegitimacy which has a devastating effect upon the constitutionally fundamental interests of citizens, and discrimination which not only rests upon, but reinforces and perpetuates, outmoded and grossly overbroad stereotypes concerning the family relationship between unwed fathers and their illegitimate children.

[20] The Government also contends that "havoc" would result from invalidation of this statute because of the assertedly "pyramiding" effect of allowing unwed fathers to bring their illegitimate children into this country. This *ad hominem* argument plainly lacks substance. Any illegitimate child of a citizen father who entered the United States would have to wait until she/he became a citizen and then further wait until he reached 21 years of age before he could, if he so desired, petition for the entry of his mother. INA §201(b) (8 U.S.C. §1151(b)). He would have to have a close enough relationship with his mother for him to be willing to undergo the rigorous screening and investigative procedures, and then would be required to sign an affidavit of support on her behalf. If the mother did obtain entry into the United States, she would then have to wait another five years before being eligible to become a citizen and only upon obtaining citizenship could she then apply for immediate relative status on behalf of any other child she might have. INA §316 (a) (8 U.S.C. §1427). Further, it is disingenuous for the Government, in defense of these statutory provisions, to raise the spectre of the alleged "pyramiding" effect of increasing the class of "parents" and "children" by judicial decision, when the legislative history discloses no similar Congressional concern about the same "pyramiding" effect of its own amendments to the definition of "parent" and "child."

CONCLUSION

For the reasons stated above and in their main brief, plaintiffs-appellants respectfully request that this Court reverse and vacate the judgment of the District Court, find that the challenged provisions are constitutionally invalid, in violation of the First, Fifth, and Ninth Amendments, and remand this case to the District Court with directions that it (1) issue a permanent injunction against the operation, execution and enforcement of the challenged statutory provisions, (2) determine plaintiffs' motion for class action certification, and (3) order the defendants to afford the plaintiffs the opportunity to establish their claimed family relationships and to grant them whatever immigration status they would have had but for the unconstitutional application of the challenged provisions.

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Respectfully submitted,

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